IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH HUANG and JULIA Y. HUANG, h/w, Plaintiffs	:	CIVIL ACTION
v.	:	
BP AMOCO CORPORATION, Defendant	:	NO. 00-1290

Newcomer, S.J. July , 2000

M E M O R A N D U M

Presently before this Court are plaintiffs' Motion for Summary Judgment, defendant's Cross-Motion for Summary Judgment, as well as various Responses and Reply briefs thereto. For the reasons set forth below, this Court denies plaintiffs' Motion for Summary Judgment, grants defendant's Motion for Summary Judgment, enters judgment for defendant, and dismisses the action.

I. BACKGROUND

Plaintiffs bring the instant action claiming that defendant BP Amoco Corporation, successor in interest by merger to Amoco Oil Company, breached a lease between plaintiffs and Amoco Oil. At all times relevant, plaintiffs Joseph Huang and Julia Huang owned a continuous lot of commercial property located in Philadelphia, Pennsylvania. Pursuant to a written lease agreement between plaintiffs and Amoco Oil executed on September 21, 1998 (referred to by the parties as either “the Lease” or “the Ground Lease”), plaintiffs let said property to Amoco Oil for a term of fifteen years with a monthly rental of $6,666.66,

escalating to $7,455.66 in years ten through fifteen.[1]

Under the Lease, defendant was allowed to improve and operate the property "for any lawful purpose including, but not limited to, a 'retail gasoline facility.'" A "retail gasoline facility" was defined by the Lease in Section 7(a) as follows:

> [T]he term 'retail gasoline facility' shall include, without limitation, a twenty-four (24) hour motor fuel facility, . . . with kiosk, free-standing canopy, and twenty-four (24) hour automatic carwash, and twenty-four (24) hour convenience store, and twenty-four (24) hour quick-serve restaurant with drive-thru, or any combination of the foregoing suitable to Lessee in Lessee's sole discretion . . . .

According to the Lease, defendant was responsible for reaching any agreements with third-party co-developers, such as a quick-service restaurant or a convenience store operator, necessary to develop the property in accordance with the foregoing specifications for a "retail gasoline facility." Pursuant to the Lease, defendant also had sole discretion to negotiate those agreements and to determine whether those agreements were suitable.

In addition to the provision that defendant reach suitable agreements with third parties, the Lease included an "Approvals" contingency which allowed defendant 180 days from the date of execution to obtain certain "Approvals" (the "Approval

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[1]The Lease stipulated, however, that no rent was due until the date Lessee first sold gasoline from the permises, but not later than 90 days after all contingencies in Section 7 were satisfied or waived, all of the provisions of Section 8 were fulfilled, and the premises were delivered to Lessee free of possession and rights of possession.

period") in conjunction with any improvements on the premises. The term "Approvals," defined in Section 7(b) and used throughout the Lease, consisted of "such unconditional approvals and permits, including but not limited to signage and curb cuts," to be obtained "from the proper municipal, county, state, and other duly constituted authorities," "for the razing of improvements, construction of improvements and installation of equipment for a retail gasoline facility and for the operation and maintenance of such facility . . . ."

On April 19, 1999, Amoco sent plaintiffs a letter advising them of Amoco's intention to terminate the Lease pursuant to Section 7(c). Defendant had not, by that time, applied for the issuance of any Approvals. In the letter, defendant wrote: "Lessee has not obtained the Approvals required by Section 7 of the Ground Lease within the prescribed 180-day period as extended to April 20, 1999 by letter dated March 19, 1999 and acknowledged by you. Accordingly, pursuant to Section 7(c) of the Ground Lease, Lessee hereby exercises its privilege of terminating the Ground Lease." In addition, defendant had not yet paid any rent to plaintiffs, nor had any rent become due as of April 19, 1999.

Plaintiffs filed the instant Motion for Summary Judgment arguing that under the Lease defendant had a certain period of time within which to obtain zoning and related municipal approvals for its proposed use of the leased premises. Plaintiffs contend that based upon defendant's admission that it

made no effort whatsoever to seek the approvals or otherwise fulfill its alleged contractual obligation to do so, defendant breached the lease and must be held accountable for resultant damages to plaintiffs - in the amount of $1,009,312.55, plus costs. Plaintiffs also claim that defendant failed to give proper notice of its termination.

Defendant filed its Cross-Motion for Summary Judgment arguing that the Lease was subject to several express contingencies which were left to the sole discretion of Amoco. Specifically, defendant asserts that the Lease gave either party the right to terminate if one or more of the contingencies specified in Section 7 were not satisfied. Allegedly, when it became clear to Amoco that some of these contingencies could not be satisfied, Amoco terminated the Lease in accordance with its terms. Regarding plaintiffs' notice argument, defendant argues that under the Lease it was not required to give notice of its termination.

II. SUMMARY JUDGMENT STANDARD

The standards by which a court decides a summary judgment motion do not change when the parties file cross motions. Southeastern Pa. Transit Auth. v. Pennsylvania Pub. Util. Common, 826 F.Supp. 1506 (E.D. Pa. 1993). A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). The evidence presented must be

viewed in the light most favorable to the non-moving party. Id. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In deciding the motion for summary judgment, it is not the function of the Court to decide disputed questions of fact, but only to determine whether genuine issues of fact exist. Id. at 248-49.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings and designate specific facts, by use of affidavits, depositions, admissions, or answers to interrogatories, showing that there is a genuine issue for trial. Id. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322). Summary judgment must be granted "against a party who fails to

make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322).

III. DISCUSSION

A. INTERPRETING THE LEASE

The parties' Motions for Summary Judgment call for the Court to interpret the disputed provisions of the Lease. It has been held "a lease is a contract and is to be interpreted according to contract principles." Hutchison v. Sunbeam Coal Corp., 519 A.2d 385, 390 (Pa. 1986). Furthermore, "[t]he court, as a matter of law, determines the existence of an ambiguity and interprets the contract." Id. See also Dorn v. Stanhope Steel, Inc., 534 A.2d 798 (Pa. Super. 1988).

As discussed below, the Court determines that the Lease, in clear and unambiguous terms, allowed defendant to terminate the contract in either of two circumstances. First, defendant could terminate if it failed to reach any agreements, suitable to defendant in its sole discretion, with third parties regarding the development of the property. Second, defendant could terminate if, for any reason, defendant failed to obtain Approvals within six months of executing the contract.

1. FAILURE OF NEGOTIATIONS WITH THIRD PARTIES

Section 7(c) of the Lease provided that:

> [I]n the event Lessee shall be unable to enter into an agreement satisfactory to Lessee, in its sole discretion, for the co-development with a third party

> quick-service restaurant and satisfying all conditions and contingencies in that agreement; . . . Lessee shall have the privilege of terminating this Lease. . . .

Defendant posits that, pursuant to this provision, Amoco was given sole discretion under Section 7 of the Lease to terminate the Lease if a suitable retail facility could not be developed on the property. The Court agrees.

As an initial matter, it must be noted that, at all times, defendant was bound by an implied covenant of good faith and fair dealing. See, e.g., Schultze v. Chevron Oil Co., 579 F.2d 776, 778-79 (3d. Cir. 1978) ("In every contract there is an implied covenant that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing.'"); see also Blue Ridge Metal Mfg. v. Proctor, 194 A. 559 (Pa. 1937); Kepple v. Fairman Drilling Co., 551 A.2d 226 (Pa. Super. 1988). Accordingly, defendant was not free to decide simply on a whim that the property was not suitable for development and then terminate the Lease.

Contrary to plaintiffs' contentions, however, that is not what defendant did in this case. Defendant has produced ample evidence that it made earnest efforts to negotiate and reach suitable agreements with third parties in order to develop a 'retail gasoline facility' on the property in accordance with the requirements of the Lease and that those negotiations failed. Most notably, the certification of Mr. Faletto includes testimony

that:

> Amoco explored the option of co-developing this property with McDonald's, but the property was too small and an adjoining property was not for sale or lease. Amoco also wanted to put a convenience store on the property, but it could not erect a suitably large convenience store without tearing down the existing car wash on the property. However, the co-operator of this property insisted a car wash.

Notwithstanding unsubstantiated allegations such as: "defendant sat on its hands for two hundred ten (210) days and did absolutely nothing in order to move forward with obtaining Approvals or otherwise complying with its obligations under the Lease," plaintiffs have offered no evidence to raise a genuine dispute regarding this testimony. Even when viewed in the light most favorable to them, plaintiffs' averments, and the reasonable inferences therefrom, support only the conclusion that plaintiffs were not well-informed as to the progress of defendant's negotiations.

Nothing in the Lease required defendant to apprise plaintiffs - in requesting an extension of the Approval period, in serving notice of termination, or at any time – of the progress, or lack thereof, of its negotiations with third parties. On the contrary, the Lease gave defendant sole discretion to conduct and to evaluate those negotiations, and defendant was permitted, by the clear and unambiguous language in Section 7(c), to terminate the Lease if defendant determined, in its sole discretion, that those negotiations did not produce a suitable result.

Defendant was unable to reach any suitable agreements with third party co-developers, and therefore, according to the provision in Section 7(c) quoted above, defendant was free to terminate the Lease.

2. FAILURE TO OBTAIN APPROVALS WITHIN SIX MONTHS

Section 7(c) of the Lease also contained a "catch-all" provision, which provided that:

> If for any reason Lessee has not obtained the Approvals within six (6) months after the date of execution of this Lease by both Lessor and Lessee, then Lessee may, at Lessee's discretion, terminate this Lease. . . .

Defendant posits that, pursuant to this catch-all provision, defendant was free to terminate without having obtained any Approvals within six months of executing the Lease. Again, the Court agrees with defendant. The parties do not dispute that defendant failed to obtain any Approvals within six months after the date of execution of the Lease. Under the catch-all provision, nothing more was required for defendant to terminate the Lease. Here, defendant clearly qualified under the provisions set forth in Section 7(c): defendant did not obtain the Approvals within 6 months after the date of execution of the Lease, and thus was permitted, at defendant's discretion, to terminate the Lease as though the Approvals had been denied. Consequently, the Court determines that defendant's termination was valid and in accordance with the catch-all provision in Section 7(c).

B. PLAINTIFFS' CONTENTIONS

1. DEFENDANT WAS REQUIRED, AT LEAST, TO APPLY FOR APPROVALS

Plaintiffs' argument that defendant's failure to apply for Approvals was, ipso facto, a breach of the Lease, is incorrect. Not only does plaintiffs' argument contradict the clear and unambiguous language of the catch-all provision of Section 7(c), but it also violates a basic principle of contract interpretation that "[o]ne part of a contract cannot be so interpreted as to annul another part[;] rather writings which comprise an agreement must be interpreted as a whole." Village Beer & Beverage v. Vernon D. Cox & Co., 475 A.2d 117, 121 (Pa. Super. 1984).

The Court determines that any obligation on the defendant to pursue Approvals was contingent upon defendant's success on procuring satisfactory agreements between defendant and third-party co-developers. In fact, the provision in Section 7(b) explicitly describes that the Approvals would be sought in connection with any improvements or installation of equipment on the premises. In the opinion of this Court, common sense dictates that defendant would not have been required to apply for zoning permits, variances, or other Approvals until defendant had determined with specificity how it would develop and operate the property. For example, when applying for permits for curb cuts, it would be necessary for defendant to inform the proper authorities as to the location and dimensions of the requested curb cuts. To the extent that the location and dimensions of

curb cuts with respect to any property are a function of the location and dimensions of the improvements planned for that property, defendant could not apply for any Approvals without any agreements or plans with third-party co-developers. The Court must conclude that any applications for Approvals would be contingent upon any satisfactory agreements between defendant and third-party co-developers.

As explained above, Section 7(c) of the Lease expressly provided that defendant could terminate the Lease without reaching agreements with third parties. Plaintiffs' proposed construction of the Lease would annul this provision. Considering Section 7 as a whole, the Court determines that defendant's termination of the Lease without having applied for Approvals was not an Event of Default.

2. PLAINTIFFS' DUE DILIGENCE ARGUMENT

Plaintiffs' argument that the Lease imposed on defendant the obligation to apply for Approvals with due diligence is unconvincing. First, the "diligence" provision upon which plaintiffs rely did not refer to defendant's applying for Approvals at all. Section 7(b) provided that defendant may, in the event any application for Approvals was denied, pursue the issuance of such Approvals "through administrative proceedings at law or in equity". In the next sentence, the parties used strikingly similar language, providing that those "administrative, legal, or equitable proceedings shall be diligently carried out." Therefore, rather than applying to

defendant's application for Approvals, the due diligence provision in Section 7(b) referred to defendant's appeals of any denials of Approvals (and that is contingent upon defendant even applying for any Approvals). This construction of the diligence provision is clear in light of language shown above, and omitted by plaintiffs in their briefing on this point.

Second, the language upon which plaintiffs rely does not impose a requirement at all. Rather, the quoted provision ensures that if defendant elects to appeal a denial of Approvals, defendant will not be considered in default so long as defendant's appeal is carried out diligently. It does not ensure, as plaintiffs contend, that defendant will necessarily be in default if defendant does not carry out such an appeal diligently. It must also be noted that the pursuit of the issuance of permits through administrative proceedings or actions at law or in equity was not compelled, but was to be at "Lessee's election." Therefore, the Court finds that contrary to plaintiffs' assertions, defendant was not required to pursue Approvals with any heightened due diligence.

3. NOTICE

Contrary to defendant's position, the catch-all provision did require notice to plaintiffs, albeit indirectly. Although the notice requirement was not located within the catch-all provision itself, the catch-all provision incorporated the notice requirement by reference. Section 7(c) provided that, if, after six months from the date of execution, defendant had failed

to obtain Approvals, defendant could terminate the Lease "as though the Approvals, or any thereof, had been denied." Section 7(b) of the Lease provided that "[i]f Lessee's application for the Approvals, or any of thereof, is denied, Lessee may terminate this Lease pursuant to Subsection 7(c)." Finally, Section 7(c) provided (in addition to the catch-all provision) that Lessee shall terminate the Lease "by giving Lessor ten (10) days' notice of its intention so to do." By this series of references, the notice requirement was meant to apply even to defendant's termination pursuant to the catch-all provision.

Nevertheless, plaintiffs' argument that defendant's termination of the Lease was improper for lack of notice is not convincing. Although notice "must be in plain, direct language, and without ambiguity," it "need be in no set form of words." Hertzog v. Leon, 124 A. 683, 684 (Pa. 1924). The parties agree that the April 19, 2000 letter from defendant to plaintiffs is a true and correct copy of the instrument by which defendant sought to terminate the Lease. That letter reads, in relevant part: "pursuant to Section 7(c) of the Ground Lease, Lessee hereby exercises its privilege of terminating the Ground Lease." The quoted language is clear and unambiguous and, further, it expressly refers to Section 7(c) of the Lease, which contains the notice requirement. Defendant's termination letter also complies with the specifications in Section 16, which provides: "[A]ll notices given under this lease shall be deemed to be properly served if delivered in writing personally, or sent by certified

mail or by overnight delivery service to Lessor at the address herein shown herein [sic].”

In addition, neither the letter of termination nor defendant’s subsequent actions offends the purpose(s) for which this notice requirement was included in the Lease. The purpose of a notice requirement is to give the recipient — in this case the Lessor — “fair warning,” so that the Lessor can plan for the impending cessation of income from Lessee, Lessee’s vacation of the Premises, and/or the cessation of Lessee’s compliance with any other covenants by which, during the notice period, Lessee will remain bound. As such, a notice of termination differs from an outright termination in that the Lessor must continue to comply with its responsibilities under the Lease after rendering a notice of termination — i.e., for the specified notice period.

Aside from the fact that defendant's April 19, 2000 letter of termination is written in the present tense (“Lessee hereby exercises its privilege . . .”), as opposed to the future tense (“Lessee will exercise its privilege in ten days”), it is difficult to see any basis for defendant’s claim that the letter was insufficient notice. As of April 19, 1999, no rent had come due under the Lease. Furthermore, defendant had not yet even taken possession of the Demised Premises. In fact, as of April 19, 1999, there were no covenants with which defendant's compliance would cease ten days later: defendant could not stop paying rent that it had yet to start paying, nor could defendant vacate premises of which it had yet to take possession.

Based on the holding in Hertzog v. Leon noted above, the Court finds that defendant was not required to include language in its notice such as “Lessee hereby gives Lessor 10 days notice, pursuant to the terms of the Lease, of Lessee’s intention to terminate the Lease 10 days from the issuance of this notice.” Nor was Lessee required to issue any additional correspondence, ten days later, indicating that “whereas ten days have passed since the issuance of Lessee’s notice to Lessor of Lessee’s intention to terminate the Lease, Lessee now confirms the termination of the Lease.” Defendant's April 19, 2000 letter was sufficient notice of its intention to terminate the Lease.

IV. CONCLUSION

Despite plaintiffs' various attempts to construe the Lease otherwise, defendant had wide discretion to terminate the Lease. According to the clear and unambiguous language of Section 7(c), defendant was free to terminate the Lease in the event that defendant failed to reach suitable agreements with third parties, or, alternatively, in the event that defendant had not, for any reason, obtained Approvals within six months from the execution of the Lease. Both set of circumstances came to pass, and therefore, defendant's termination was not a breach of the Lease. In addition, defendant's April 19, 2000 letter of termination constituted sufficient notice as a matter of law.

Accordingly, Plaintiffs' Motion for Summary Judgment is denied and defendant's Motion for Summary Judgement is granted. An appropriate order will follow.

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Clarence C. Newcomer, S.J.

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O R D E R

And now, this day of July, 2000, upon consideration of plaintiffs Motion for Summary Judgment, defendant's Cross-Motion for Summary Judgment, and all responses, reply briefs, and supporting memoranda submitted by the Parties, it is hereby ORDERED as follows:

(1) Plaintiffs' Motion for Summary Judgment is DENIED.

(2) Defendant's Cross-Motion for Summary Judgment is GRANTED.

(3) Judgment is entered for defendant and against plaintiff.

(4) All outstanding motions are denied as moot, judgment having been entered.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, S.J.